UNITED STATES
V.
CALLA MORTENSON ET AL.

IBLA 71-195 Decided August 21, 1972

Appeal in Contest No. OR-2801, from a decision of the hearing examiner, Rudulph M. Steiner, Sacramento, California, declaring the Vita lode mining claim null and void.

Affirmed.

Mining Claims: Discovery

The Government has no duty to excavate for the mineral or to rehabilitate the claimants' discovery points.

Mining Claims: Discovery: Contests: Burden of Proof

The claimant does not meet his burden to establish the existence of a valuable mineral deposit by showing the claim to have been valuable in the past.

Mining Claims: Contests: Burden of Proof

The Government has the initial burden of establishing a prima facie case that the claim is invalid. The contestee must then prove by a preponderance of the evidence that the claim is valid.

Mining Claims: Contests

When determining the reasonability of developing a mining claim the prudence of the claimant is not at issue, and the "prudence" referred to in Castle v. Womble is not measured by the way in which he conserves his limited economic means.

APPEARANCES: Calla Mortenson and John A. Mortenson, pro sese.

OPINION BY MR. STUEBING

Appellants have appealed from the decision of the hearing examiner issued January 25, 1971, declaring the Vita mining claim situated in Kittitas County, Washington, null and void for lack of a valuable mineral deposit, within the meaning of the law set out in 30 U.S.C. § 42 (1970).

The complaint, issued pursuant to the recommendation of the Forest Service and amended on April 26, 1968, alleged that:

> (1) Minerals have not been found within the limits of the claim in sufficient quantities to constitute a valid discovery.
>
> (2) Land within the boundaries of the claim is nonmineral in character.

In their answer appellants deny these charges. They allege that gold was discovered in their area, the Swauk Mining District, in the year 1871, that mining has been carried on every year since that time, and that the Bureau of Land Management had declared properties as mineral which were within the confines of the Swauk Mining District.

Mr. Mortenson testified that he had worked on an ore body on the east end of the claim consisting of mineralized material about 8 feet wide. However, in 1945 - 1950 the workings were destroyed by a cave-in when the highway department was working in the area. An assay report dated June 14, 1931, of a sample of the mineralized material shows .64 ounces of gold per ton, or $12.80 computed at $20 per ounce. Ever since the cave-in the appellants have been trying to rediscover the said mineralized area, which is now somewhere under 40 feet of overburden.

At present there are no veins or lodes of mineralized rock in place bearing economically recoverable gold exposed on the claim. In fact, the assay reports of November 12, 1958, and August 17, 1965, show no recoverable gold per ton. The appellants' contention now is, "[We] think it has minerals and justifies being explored."

The first step which a claimant must take in establishing the fact of discovery is to show physically exposed ore within the limits of his claim. United States v. Maurice E. Jones, 2 IBLA 237 (1971). Second, this ore must be exposed and shown at the time the claim is questioned. That is, the claimant does not carry his burden by showing the claim to have been valuable in the past, but not at the

time the validity of his claim is investigated. United States v. Margherita Logomarcini, 60 I.D. 371 (1949), and cases cited therein. The appellants have failed both of these tests. By their own admission, the claim does not presently contain exposed valuable mineral, and appellants' only asserted vein is now covered by 40 feet of overburden and has been for 20 years.

Appellants next contend that the Government has not carried its case because

> Milvoy Suchy (the Government's mining examiner) * * * did not prove the Vita Lode Claim to be nonmineral in character, as the ore body is in place in the solid rock formation. Therefore the testimony of Milvoy Suchy should be deleted.

Although the Government has the initial burden of establishing prima facie that the claim is invalid, the contestee must then prove by a preponderance of the evidence that the claim is valid. United States v. Ray Guthrie, 5 IBLA 303 (1972); United States v. L. B. McGuire, 4 IBLA 307 (1972). The Government proved its case by showing no valuable mineral deposits are exposed in accessible areas of the mining claim. The Government's mineral examiner had no duty to excavate for the mineral or to rehabilitate claimant's discovery points for him. United States v. Howard S. McKenzie, 4 IBLA 97 (1971). That the land may be mineral in character does not vitiate the requirement that a discovery of a valuable mineral has been made and is still extant.

Appellants assert their status as prudent operators by promising not to go beyond their limited economic means in removing the overburden to expose the mineral ore body on the Vita lode claim. The prudence test is not subjective or one of conservation of the individual's economic means, but the judgment of an ordinary prudent man knowing all the facts relevant to the development of a mine. Castle v. Womble, 19 L.D. 455, 457 (1894), states:

> [W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

We concur in the decision of the hearing examiner. The Government established a prima facie case in the support of its charge of no discovery. As pointed out above, contestees presented no countervailing evidence of a present, physically exposed, valuable mineral deposit. Thus, the record compels the finding that no discovery has been made on the claim. Even assuming the correctness of appellants' contention that at one time there was a valid discovery on the claim which may be worth further exploration, such evidence is insufficient to support an allegation of an existing discovery. United States v. Margherita Logomarcini, supra. Contrary to appellant's contention, it is not the obligation of the Government to negate the possibility of a discovery by doing further exploratory work. United States v. Howard S. McKenzie, supra.

Finally, the "prudence" to which reference is made in the "prudent man test" first articulated in Castle v. Womble, supra, is measured by the probability of developing a valuable as determined by an ordinary man with knowledge and understanding of all of the facts involved; not by the degree of prudence which a particular claimant exercises in the conservation of his individual economic means.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision of the hearing examiner is affirmed.

Edward W. Stuebing
Member

We concur:

Newton Frishberg
Chairman

Frederick Fishman
Member